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10/541,840	07/10/2006	Jean-Louis H. Gueret	05725.1484-00000	4272

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EXAMINER

GULLEDGE, BRIAN M

ART UNIT	PAPER NUMBER
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1612

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02/23/2011

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/541,840	Applicant(s) GUERET, JEAN-LOUIS H.	
	Examiner Brian Gullede	Art Unit 1612	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 2 March 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 18-43 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 18-43 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 2 March 2010 has been entered.

Previous Rejections

Applicants' arguments, filed 2 March 2010, have been fully considered. Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

Claim Rejections - 35 USC § 112, 2nd Paragraph

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 34-36 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant

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regards as the invention. Claims 34-36 recite limitations to "the container." There is insufficient antecedent basis for this limitation in the claims. The claims all depend from claim 18. However, claim 18 does not recite or refer to a container.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 18-23 and 25-26 are rejected under 35 U.S.C. 102(b) as being anticipated by Strack et al. (US Patent 4,913,957). Strack et al. discloses a fabric laminate which can be used to impart heated treatment liquids to skin, wherein the laminate consists of a skin contact layer, a low porous first barrier layer, a reservoir layer, and a second barrier layer (abstract, lines 1-8). Strack et al. teaches that the first barrier layer has some porosity in order to allow the release of vapor from the reservoir layer so that a build up of pressure does not cause delamination (abstract, lines 14-19). Strack et al. teaches it is known that warming the skin increases the flow of blood to the treated area and thereby provides a more rapid diffusion of moisturizing compositions into the skin (column 1, lines 11-19). Strack et al. further teaches heating the cosmetic by use of microwave energy (column 2, lines 4-8), which is a source of energy external to the article and cosmetic composition.

Instant claim 18 recites that the carrier has two opposite non-occlusive surfaces, and that the at least part of the cosmetic product is allowed to pass through the carrier. Three of the four layers in the taught fabric laminate are non-occlusive (i.e. are permeable). The reservoir layer and first barrier layer are permeable to at least vapor, and the skin contact layer allows for the

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cosmetic to transfer therefrom to the skin of the user. This laminate patch disclosed by Strack et al., and the method of using it by heating it with microwave energy before application, anticipates the method recited by instant claims 18-23 and 25-26.

Instant claims 29 and 30 recite further limitations to the temperature to which the cosmetic is heated. Strack et al. teaches that a useful temperature to heat the cosmetic material is about 120 °F, which is 49 °C (column 5, lines 26-38), and this temperature reads on the instantly recited ranges.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 18-26 and 29-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burkhart (US Patent 6,537,308) and Strack et al. (US Patent 4,913,957). Burkhart discloses washable facial masks that comprise two eye patch regions, wherein each eye patch has a pocket means allowing for the placement of facial contact elements (abstract, lines 1-8 & figure 1). Burkhart teaches that the mask can be used to hold therapeutic materials, such as aromatherapeutics and moisturizers, against the user's face (column 2, lines 13-20), or alternatively the patch can hold hot compress bags (column 2, line 20-22). Burkhart teaches that the eye patch is made of a mesh material that allows free egress and permeability of moisture and vapor, such as cotton or silk (column 3, lines 23-34).

Instant claim 18 recites a method of applying a cosmetic, including the step of increasing the temperature of the cosmetic product via an energy source external to the carrier material (the

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patch of Burkhart) before application. Burkhart does not disclose heating the moisturizing material prior to application, and does not teach the how materials are to be heated.

Strack et al. teaches that in beauty care it is desirable to use hot or cold packs to deliver hot or cold treatments to users, and that in particular with regards to moisturizing lotions it is known that warming the skin increases the flow of blood to the treated area and thereby provides a more rapid diffusion of the moisturizing composition into the skin (column 1, lines 11-19). Strack et al. further teaches heating the cosmetic by use of microwave energy (column 2, lines 4-8), which is a source of energy external to the article and cosmetic composition.

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have heated the moisturizer component taught by Burkhart. Strack et al. teaches that it is beneficial to heat moisturizers before use in order to provide better distribution into the skin. Additionally, it would have been prima facie obvious to heat the cosmetic by use of microwave energy, as Strack et al. teaches that this is a useful means for heating cosmetics and patches containing these cosmetics. This taught method (heating the moisturizing material disclosed by Burkhart before use) read on the limitations recited by instant claims 18-26.

Instant claims 29 and 30 recite further limitations to the temperature to which the cosmetic is heated. Strack et al. teaches that a useful temperature to heat the cosmetic material is about 120 °F, which is 49 °C (column 5, lines 26-38). This temperature reads on the temperature instantly recited. Strack et al. does not disclosed how long the material would have to be heated in order to reach this temperature, which are limitations recited by instant claims 31-33. However, it would have been prima facie obvious to one of ordinary skill in the art at the time

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the invention was made to have determined how long the object would need to be heated in a microwave to reach 120 °F. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). See MPEP 2144.05(II)(A).

Claims 27 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burkhart (US Patent 6,537,308) and Strack et al. (US Patent 4,913,957) as applied to claim 18 above, and further in view of Timothy (UK Patent Application Publication 2348608). Burkhart and Strack et al. teach all of the limitations recited by instant claims 27 and 28 except for the step of heating the material by first immersing the material into a liquid such as water.

Timothy discusses hot bandages for treating the skin (page 1, first paragraph). Timothy states that the bandage can be heated by placing it in a microwave oven for a short period of time, placing it on a radiator, or by immersion in hot water (page 1, third paragraph).

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have heated the patch disclosed by Burkhart by immersing it in hot water instead of heating it with microwave energy. Timothy teaches that both microwave energy and hot water immersion are useful for heating objects to be applied to the skin. And it is prima facie obvious to substitute one known element for another when the substituted elements are both known for the same function. See MPEP 2143(B).

Claims 34-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burkhart (US Patent 6,537,308) and Strack et al. (US Patent 4,913,957) as applied to claim

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18 above, and further in view of Motsenbocker (US Patent 6,497,341). Instant claims 34-36 refer to the carrier being on a grid in a container, and also recite additional limitations to the container. It is unclear how this container relates to the method recited by instant claim 18. Instant claim 18 does not refer to a container, and no step requires the carrier or cosmetic to be placed inside of anything. It appears that the container is being used to heat the carrier material, and the Examiner interprets the claims as if claim 34 recites that the carrier is placed into the container in order to increase the temperature of the carrier.

Burkhart and Strack et al. teach all of the limitations recited by instant claims 34-36 except for the step of heating the material by placing it on a grid in a container above a vaporizable liquid.

Motsenbocker discloses a device for warming and dispensing towels (title), and Motsenbocker also teaches that the device can be used for cosmetic articles such as wipes (column 5, lines 12-19). The device disclosed by Motsenbocker includes a grid that is affixed such that there is a space between the heating element and the article most proximate to the heating element (column 3, lines 63 – column 4, line 18 & figures 4-5). It also has a cover member that acts as a sealing device in order to hold moisture in (column 3, lines 59-62), as the heating is accomplished using hot vapor that is generated from within the dispenser (column 2, lines 3-5).

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have heated the patch disclosed by Burkhart by placing it in the warming device taught by Motsenbocker. This device is taught to heat the object before

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application to the skin. And it is prima facie obvious to substitute one known element for another when the substituted elements are both known for the same function. See MPEP 2143(B).

Claims 37-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burkhart (US Patent 6,537,308) and Strack et al. (US Patent 4,913,957) as applied to claim 18 above, and further in view of Barbesino (International Patent Application Publication WO 00/43286) and Huffer et al. (European Patent Application Publication EP 1191317). Burkhart and Strack et al. teach all of the limitations recited by instant claims 37-43 except for the inclusion of thermochromatic pigment.

Barbesino teaches that it is known that temperature variations have a significant influence on the level of activity of a cosmetic preparation (page 1, lines 10-11). Barbesino further teaches that the hot application of a cosmetic requires the availability of a source of heat to warm up the cosmetic and accurate control of the treatment temperature (page 1, lines 18-19). Application at too high a temperature may cause damage, and the use of too low a temperature may not give the expected results (page 1, lines 20-22).

Huffer et al. discloses a thermally sensitive indicia that serves as a temperature sensing element (abstract, lines 1-8). This indicia is in the form of a label that can be removably applied to a container for which the temperature is desired to be known (paragraphs [1-2]). The label contains a thermochromatic pigment that is printed on the inner ply of the two ply label (paragraph [10], lines 1-11).

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have included the temperature sensing element taught by Huffer

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et al. with the cosmetic patch disclosed by Burkhart. Barbesino teaches that with cosmetics that it is desirable to control the temperature of the cosmetic and keep it from being both too hot and too cold, and the thermally sensitive indicia taught by Huffer et al. would allow the skilled artisan to verify that the temperature of the cosmetic is appropriate before use.

Claims 27 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strack et al. (US Patent 4,913,957) in view of Timothy (UK Patent Application Publication 2348608). Strack et al. discloses a fabric laminate which can be used to impart heated treatment liquids to skin, wherein the laminate consists of a skin contact layer, a low porous first barrier layer, a reservoir layer, and a second barrier layer (abstract, lines 1-8). Strack et al. teaches that the first barrier layer has some porosity in order to allow the release of vapor from the reservoir layer so that a build up of pressure does not cause delamination (abstract, lines 14-19). Strack et al. teaches it is known that warming the skin increases the flow of blood to the treated area and thereby provides a more rapid diffusion of moisturizing compositions into the skin (column 1, lines 11-19). Strack et al. further teaches heating the cosmetic by use of microwave energy (column 2, lines 4-8), which is a source of energy external to the article and cosmetic composition. However, Strack et al. does not teach heating the material by first immersing the material into a liquid such as water.

Timothy discusses hot bandages for treating the skin (page 1, first paragraph). Timothy states that the bandage can be heated by placing it in a microwave oven for a short period of time, placing it on a radiator, or by immersion in hot water (page 1, third paragraph).

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Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have heated the patch disclosed by Strack et al. by immersing it in hot water instead of heating it with microwave energy. Timothy teaches that both microwave energy and hot water immersion are useful for heating objects to be applied to the skin. And it is prima facie obvious to substitute one known element for another when the substituted elements are both known for the same function. See MPEP 2143(B).

Claims 31-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strack et al. (US Patent 4,913,957). Strack et al. discloses a fabric laminate which can be used to impart heated treatment liquids to skin, wherein the laminate consists of a skin contact layer, a low porous first barrier layer, a reservoir layer, and a second barrier layer (abstract, lines 1-8). Strack et al. teaches that the first barrier layer has some porosity in order to allow the release of vapor from the reservoir layer so that a build up of pressure does not cause delamination (abstract, lines 14-19). Strack et al. teaches it is known that warming the skin increases the flow of blood to the treated area and thereby provides a more rapid diffusion of moisturizing compositions into the skin (column 1, lines 11-19). Strack et al. further teaches heating the cosmetic by use of microwave energy (column 2, lines 4-8), which is a source of energy external to the article and cosmetic composition.

Strack et al. teaches that a useful temperature to heat the cosmetic material is about 120 °F, which is 49 °C (column 5, lines 26-38), but Strack et al. does not teach how long the material would need to be heated in order to reach this temperature, which are limitations recited by instant claims 31-33. However, it would have been prima facie obvious to one of ordinary skill

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in the art at the time the invention was made to have determined how long the object would need to be heated in a microwave to reach 120 °F. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). See MPEP 2144.05(II)(A).

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Instant claims 34-36 refer to the carrier being on a grid in a container, and also recite additional limitations to the container. It is unclear how this container relates to the method recited by instant claim 18. Instant claim 18 does not refer to a container, and no step requires the carrier or cosmetic to be placed inside of anything. It appears that the container is being used to heat the carrier material, and the Examiner interprets the claims as if claim 34 recites that the

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carrier is placed into the container in order to increase the temperature of the carrier. Strack et al. does not teach the step of heating the material by placing it on a grid in a container above a vaporizable liquid.

Motsenbocker discloses a device for warming and dispensing towels (title), and Motsenbocker also teaches that the device can be used for cosmetic articles such as wipes (column 5, lines 12-19). The device disclosed by Motsenbocker includes a grid that is affixed such that there is a space between the heating element and the article most proximate to the heating element (column 3, lines 63 – column 4, line 18 & figures 4-5). It also has a cover member that acts as a sealing device in order to hold moisture in (column 3, lines 59-62), as the heating is accomplished using hot vapor that is generated from within the dispenser (column 2, lines 3-5).

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have heated the patch disclosed by Strack et al. by placing it in the warming device taught by Motsenbocker. This device is taught to heat the object before application to the skin. And it is prima facie obvious to substitute one known element for another when the substituted elements are both known for the same function. See MPEP 2143(B).

Claims 37-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strack et al. (US Patent 4,913,957) in view of Barbesino (International Patent Application Publication WO 00/43286) and Huffer et al. (European Patent Application Publication EP 1191317)). Strack et al. discloses a fabric laminate which can be used to impart heated treatment liquids to skin, wherein the laminate consists of a skin contact layer, a low porous first barrier

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layer, a reservoir layer, and a second barrier layer (abstract, lines 1-8). Strack et al. teaches that the first barrier layer has some porosity in order to allow the release of vapor from the reservoir layer so that a build up of pressure does not cause delamination (abstract, lines 14-19). Strack et al. teaches it is known that warming the skin increases the flow of blood to the treated area and thereby provides a more rapid diffusion of moisturizing compositions into the skin (column 1, lines 11-19). Strack et al. further teaches heating the cosmetic by use of microwave energy (column 2, lines 4-8), which is a source of energy external to the article and cosmetic composition. However, Strack et al. does not teach heating the inclusion of a thermochromatic pigment.

Barbesino teaches that it is known that temperature variations have a significant influence on the level of activity of a cosmetic preparation (page 1, lines 10-11). Barbesino further teaches that the hot application of a cosmetic requires the availability of a source of heat to warm up the cosmetic and accurate control of the treatment temperature (page 1, lines 18-19). Application at too high a temperature may cause damage, and the use of too low a temperature may not give the expected results (page 1, lines 20-22).

Huffer et al. discloses a thermally sensitive indicia that serves as a temperature sensing element (abstract, lines 1-8). This indicia is in the form of a label that can be removably applied to a container for which the temperature is desired to be known (paragraphs [1-2]). The label contains a thermochromatic pigment that is printed on the inner ply of the two ply label (paragraph [10], lines 1-11).

Therefore, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have included the temperature sensing element taught by Huffer

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et al. with the cosmetic patch disclosed by Strack et al. Barbesino teaches that with cosmetics that it is desirable to control the temperature of the cosmetic and keep it from being both too hot and too cold, and the thermally sensitive indicia taught by Huffer et al. would allow the skilled artisan to verify that the temperature of the cosmetic is appropriate before use.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian Gullledge whose telephone number is (571) 270-5756. The examiner can normally be reached on Monday-Thursday 6:00am - 3:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frederick Krass can be reached on (571) 272-0580. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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BMG

/Frederick Krass/

Supervisory Patent Examiner, Art Unit 1612